

<sup>2</sup> Docket No. 80,669.

disability has diminished." In the Amended Application for Review and Modification respondent elaborated that review was sought "for the reason that claimant is working and his wages have increased changing his entitlement to permanent partial disability benefits."

Respondent also filed on April 9, 1999 a Motion to Compel Claimant's Testimony, which alleged:

1. Respondent has requested of Claimant's counsel that she produce the Claimant for his deposition pursuant to the Application for Review and Modification which has been filed with this Court.
2. Claimant's counsel has refused to produce her client for the purpose of taking his deposition.

On May 12, 1999, claimant, in response, filed a Motion for Attorney's Fees for defending the post-award review and modification proceeding, a Motion for Penalties for respondent's alleged failure to pay compensation due, and a Motion for Interest on Compensation. There was also an Amended Motion for Attorney's Fees filed on May 13, 1999 and a Motion to Dismiss Application for Review and Modification filed on May 17, 1999.

After conducting a hearing on June 17, 1999, Judge Fuller denied the claimant's request to dismiss the Application for Review and Modification and for attorney fees. The ALJ granted the respondent's request to compel claimant to appear at a deposition and give testimony.

Claimant appealed that order to the Board contending the ALJ exceeded her authority by (1) denying the Motion to Dismiss Application for Review and Modification, (2) ordering claimant to appear at a deposition and give testimony and (3) denying claimant's Motion for Attorney Fees. In an Order dated June 27, 2000, the Board affirmed the denial of the request to dismiss, affirmed the order compelling claimant's testimony, and remanded the claim to the ALJ with instructions to address the remaining issues. By a Decision dated November 9, 2000, Judge Fuller modified the award to a 27 percent permanent partial general disability and beginning October 19, 1999 forward, to a permanent partial disability based upon claimant's functional impairment of 18 percent.

Claimant describes the issues before the Board on this appeal in his Application for Review as follows:

1. The Administrative Law Judge exceeded her authority in granting and hearing Respondent's Motion for Review and Modification.
2. The Administrative Law Judge Erred and/or Exceeded her authority by modifying claimant's work disability award entered herein.

3. The Administrative Law Judge Erred and/or Exceeded her authority denying claimant's Motion for Attorney Fees pursuant to K.S.A. 44-536(g) and K.S.A. 44-536a(d).
4. The Administrative Law Judge exceeded her authority in granting Respondent's Motion to Compel Claimant's Testimony as there is no authority which authorizes the Administrative Law Judge to grant said motion.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the statements of counsel, the Appeals Board finds that the issues raised in this appeal duplicate the issues raised in claimant's appeal of the ALJ's June 17, 1999 Order. In fact, instead of filing new briefs to the Board, the parties simply direct the Board to their briefs submitted in connection with that prior appeal. The Board, likewise, adopts and incorporates by reference its Order of June 27, 2000.<sup>3</sup>

The only issue claimant raises in this appeal that arguably was not raised before, is issue number 2: "The Administrative Law Judge Erred and/or Exceeded her authority by modifying claimant's work disability award entered herein." But at no time during oral argument to the Board, nor in any brief, did claimant challenge the findings, conclusions or the award computations made by the ALJ in her November 9, 2000 Decision. Accordingly, the Board considers issue number 2 to be a restatement or redundant of issues number 1 and 4, which the Board addressed in its previous order. As to issue number 3 regarding attorney fees, the Board said in its previous order, the following:

Finally, claimant argues the Judge erred by denying her request for attorney fees. Claimant argues that an award of attorney's fees is mandatory because the statute uses the language "shall". The Appeals Board disagrees. That mandatory language refers to cases where there is "no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits." The language of K.S.A. 1999 Supp. 44-536(g) goes on to provide that "If the services rendered herein result in a denial of additional compensation, the director **may** authorize a fee to be paid by the respondent." (Emphasis added.) There were no benefits ordered by Judge Fuller's June 23, 1999 Order. Therefore, an award of attorney's fees is not mandatory. Nevertheless, there has been a preliminary showing that facts may exist that would require the initial award to be modified with respect to the nature and extent of claimant's permanent partial disability. Under these circumstances, the Appeals Board concludes the Judge should have taken the request for attorney fees under

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<sup>3</sup> See also Acosta v. National Beef Packing Co., L.P., WCAB Docket No. 206,691 (Nov. 2000).

advisement until the proceedings on the Application for Review and Modification are concluded and a decision rendered. This is preferable to deciding claimant's entitlement to attorney fees for defending the review and modification proceeding piecemeal. Accordingly, that portion of the Judge's order that denies claimant an attorney fee is reversed to preserve the issue until such time as the ALJ makes a final decision on the Application for Review and Modification.

Unfortunately, the ALJ failed to address this issue in her November 9, 2000 Decision. Therefore, the Board will remand the issue to the ALJ again for further consideration and, if deemed necessary, for further proceedings on the sole issue of claimant's request for attorney fees.

**AWARD**

**WHEREFORE**, the Appeals Board affirms the November 9, 2000 Decision entered by Administrative Law Judge Pamela J. Fuller, but remands this claim to the Judge to address the remaining issue of attorney fees.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
D. Shane Bangerter, Dodge City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director